PRE-ARGUMENT CONFERENCES IN THE SIXTH CIRCUIT COURT OF APPEALS

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In the latter part of 1981, the Sixth Circuit Court of Appeals began experimenting with a pre-argument conference procedure that brings counsel in new civil appeals together for the purpose of (1) attempting to resolve procedural problems, (2) clarifying the issues on appeal, and (3) exploring possibilities of settlement. Recently, the court determined that the program was successful and adopted it as a permanent addition to appellate procedure in the Sixth Circuit. In this article, Robert Rack, the court's Conference Attorney, discusses some of the considerations that led to the court's decision to initiate this new function and describes how the program works today. Mr. Rack offers perspectives on settlement negotiation at the appellate stage in the context of the unique opportunities provided by the pre-argument conference forum.

I. INTRODUCTION

This article describes the history, purposes and procedures of the Sixth Circuit's Pre-Argument Conference Program. It is not intended as an evaluation of or a report on the program, but rather as a presentation of some of the experiences and perspectives that have been gained since the program began.

The reader is cautioned that the program is still experimental and that the procedures described in this article are subject to change. Additionally, some of the practices discussed are matters of personal style and might not be used by another conference attorney or a judge.

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II. History

The Sixth Circuit Court of Appeals first began to seriously consider creating a pre-argument conference program in 1981. At that time, the number of new civil case filings had increased 46% over the prior five years.[1] The number of cases heard or submitted per panel had increased by 30% during this period[2] and the time between filing of the record on appeal and disposition had increased to seventeen months.[3] Faced with this constantly increasing caseload, the court, under the administration of then Chief Judge George Edwards,[4] sought methods of increasing and expediting the termination of appeals without denying counsel the opportunity for oral argument.

In January of 1981, Judge Edwards and Sixth Circuit Executive Jim Higgins travelled to New York to observe the Civil Appeals Management Plan (CAMP) of the United States Court of Appeals for the Second Circuit.[5] Reports from the Second Circuit indicated that lawyers hired by the court to conduct scheduling and settlement conferences in new civil appeals were meeting with considerable success. Cases were being dismissed from the court's docket pursuant to settlements achieved through this pre-argument conference procedure. In addition, issues were refined in the briefs and motions were being prevented.[6] The Sixth Circuit visitors concluded that

1. 1981 Admin. Office U.S. Cts., Mgmt. Statistics U.S. Cts. 7.

2. *Id.*

3. *Id.*

4. Judge Edwards' term as Chief Judge began January 18, 1979 and ended September 30, 1983.

5. The Second Circuit's program began in 1974 after Chief Judge Kaufman's success in using Rule 33 of the Federal Rules of Appellate Procedure to encourage settlement discussions. *See* Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 Colum. L. Rev. 1094 (1974). For a detailed discussion of the Second Circuit's experience under CAMP, see Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 Colum. L. Rev. 1209 (1978) and A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Fed. Jud. Ctr. 1983). For a general discussion of presubmission case management procedures in the Second Circuit, see L. Farmer, Appeals Expediting Systems: An Evaluation of Second & Eighth Circuit Procedures (Fed. Jud. Ctr. 1981).

6. Second Cir. Research Advisory Committee, Evaluation of the Civil Appeals Management Plan (Sept. 30, 1981). An earlier account of the success of CAMP in the Second Circuit may be found in Benjamin & Morris, *The Appellate Settlement Conference: A Procedure Whose Time Has Come*, 62 A.B.A. J. 1433 (1976).

such a program, with modifications,[7] could be productive for this court.

In April of 1981, the Sixth Circuit adopted local Rule 18 which established a pre-argument conference program.[8] Over the next six

7. The bulk of cases in the Second Circuit involve New York City lawyers. Hence, travel to the court is not so burdensome as in the Sixth Circuit, where the caseload, and consequently the lawyers, are more evenly distributed throughout a four-state area. For this reason, the Sixth Circuit primarily conducts its conferences by telephone rather than in person.

Another difference is that the Second Circuit program schedules and monitors briefing in all cases and frequently imposes shorter deadlines than are provided by the Federal Rules of Appellate Procedure. The Sixth Circuit's present backlog makes this early scheduling function superfluous.

8. Sixth Circuit Rule 18 provides as follows:

PRE-ARGUMENT CONFERENCE PROCEDURE

(a) Transmission of Documents. Upon the filing of a notice of appeal in a civil case, the clerk of the district court shall forthwith transmit a copy of the notice of appeal to the clerk of the court of appeals, who shall promptly enter the appeal upon the appropriate records of the court of appeals. Each notice of appeal so transmitted shall have appended thereto a copy of:

(1) the docket sheet of the court or agency from which the appeal is taken;
(2) the judgment or order sought to be reviewed;
(3) any opinion or findings;
(4) any report and recommendation prepared by the United States Magistrate.

(b) Filing Pre-Argument Statement.

(1) Appeals from United States District Courts.

Within fourteen days after filing the notice of appeal in the district court, the appellant shall cause to be filed with the clerk of the court of appeals, with service on all other parties a pre-argument statement detailing information needed for the prompt disposition of an appeal.

(2) Review of Administrative Agency Orders; Applications for Enforcement.

Within fourteen days after the filing of a petition for review of an order of an administrative agency, board, commission or officer, or an application for enforcement of an order of an agency, the petitioner or applicant shall cause to be filed with the clerk of the court of appeals, with service on all other parties, a pre-argument statement detailing information needed for the prompt disposition of the petition or application (see form 6CA-54).

(c) Pre-Argument Conference; Pre-Argument Conference Order.

(1) All civil cases shall be reviewed to determine if a pre-argument conference, pursuant to Rule 33, Federal Rules of Appellate Procedure, would be of assistance to the court or the parties. Such a conference may be conducted by a circuit judge or a staff attorney of the court known as the conference attorney.

(2) A circuit judge or conference attorney may direct the attorneys for all parties to attend a pre-argument conference, in person or by telephone, to be held as soon as practicable after the filing of the pre-argument statement. Such conference shall be conducted by the conference attorney or a circuit judge

months, the court sought staff for the program and continued to consider what features should be given priority. Direct communication between the court's staff and counsel in all new appeals would afford an opportunity to review some of the court's rules and explain the more problematic procedural requirements. Thus, confusion might be reduced and procedural motions prevented. If cases that would otherwise proceed to oral argument and decision by the court could be settled, however, there would be savings of both administrative and judicial resources. There also would be substantial savings to the litigants. To assure himself of the viability of settlement as a primary goal, Judge Edwards personally conducted pre-argument conferences in three cases selected by the Chief Deputy Clerk. All were money judgment cases involving insurance companies and each of them settled before the parties went home. While the question of whether a staff lawyer could produce the same results as a circuit court judge naturally persisted, the decision was nonetheless made to direct the Conference Attorney to explore all possible advantages of the program with the primary goal of getting cases settled.

The court recognized that the Conference Attorney would need to stimulate candid discussion of the issues and merits of cases and that confidentiality from the court was necessary. For this reason, the Conference Attorney's office was separated from the court's routine decisionmaking processes and personnel. The program is provided separate staff;[9] the Conference Attorney reports directly to the Chief Judge regarding policy matters and to the Circuit Executive regarding administrative matters.

The work of the program got underway with the hiring of the Conference Attorney in November, 1981. During the first six months, at the request of Judge Edwards, active and senior judges of the court personally conducted a number of pre-argument conferences.[10] In doing so, they provided the Conference Attorney with an opportunity to observe different styles of conducting the conferences and developed first hand impressions of how such a program would work in a federal court of appeals. Finally, and perhaps most importantly, the judges' involvement demonstrated to the bar the court's interest in and commitment to the pre-argument to the bar the court's interest in and commitment to the pre-argument conference as a new vehicle for handling and helping to dispose of cases in the Sixth Circuit. As planned, today there is almost no judicial involvement in the conferences.

The conference program was initiated on an experimental basis. Two years later, in November of 1983, the court determined the program was helpful in settling a substantial number[11] of cases that would have otherwise required oral argument and decision,[12] and

designated by the chief judge, to consider the possibility of settlement, the simplification of the issues, and any other matters which the circuit judge or conference attorney determines may aid in the handling of the disposition of the proceedings.

(3) At the conclusion of the pre-argument conference, the circuit judge or conference attorney shall enter a pre-argument conference order which shall control the subsequent course of the proceedings.

(d) Non-Compliance Sanctions.

(1) If the appellant, petitioner or applicant has not taken the action specified in paragraph (b) of this procedure within the time specified, the appeal, petition or application may be dismissed by the clerk without further notice.

(2) In the event of default by an appellant, petitioner or applicant in any action required by a pre-argument conference order, the clerk shall issue a notice to the appellant, petitioner or applicant that the appeal shall be dismissed unless, within ten days thereafter, the appellant, petitioner or applicant shall file an affidavit showing good cause for the default and indicating when the required action will be taken.

(3) In the event of default by a party other than an appellant, petitioner or applicant in any action required by a pre-argument conference order, the clerk shall issue a notice to the party in default providing a ten-day period within which to file an affidavit showing good cause for the default and indicating when the required action will be taken.

(e) Effective Date of Pre-Argument Conference Procedure.

(1) The foregoing pre-argument conference procedure shall be applicable to all civil appeals from the district courts in which the notice of appeal is filed on or after August 1, 1981.

(2) The foregoing pre-argument conference procedure shall be applicable to all petitions for review of an order of an administrative agency, board, commission or officer, or an application for enforcement of an order of an agency, filed in the court of appeals on or after August 1, 1981.

6th Cir. R. 18. Amendments to Rule 18 are being considered that more clearly describe current practice. *See infra* notes 20 & 22.

9. The program staff consists of two assistant conference attorneys and a secretary.

10. Eight judges of the Sixth Circuit have conducted pre-argument conferences.

11. Of the cases in which pre-argument conferences were scheduled in 1983, approximately 130 or slightly more than 25% settled.

12. Cases settled pursuant to Sixth Circuit Rule 18 are considered to be cases that otherwise would go forward to decision by the court. Approximately 90% of the cases disposed of by the court under Sixth Circuit Rule 9, after briefs but before oral argument, are disposed of for being frivolous, unsubstantial or jurisdictionally defective. These are the types of cases routinely excluded from the conference program. See also *infra* note 18 for lawyers' estimates of chances of settlement without the conference.

voted to adopt the program as a permanent addition to the court.

III. Case Selection and Scheduling

Sixth Circuit Rule 18 authorizes pre-argument conferences in all civil appeals. At this time, however, habeas corpus, prisoner rights, and pro se cases are excluded from the pool of cases eligible for conferences.[13] Most agency cases also have been routinely excluded,[14] although that practice is being reviewed. From this remaining pool, about half of the cases are scheduled for conferences.

After trying for almost a year to select cases with high settlement potential, the program staff could discern no factors reliably predictive of settlement from the Pre-Argument Statement[15] or any of the trial court documents available at this early stage of the appeal.[16] The staff decided that their time was more efficiently spent preparing for and conducting conferences. Thus, today there are no distinct criteria routinely applied in the selection of cases. In fact, cases are settled in roughly the same proportions, by case type, as cases

13. These cases are not thought to be generally amenable to settlement.

14. Settlement negotiations with the federal government is often difficult due to the number of lawyers of review required before authority can be obtained to settle. Also, the Government's position is frequently based more on principle than expediency, making compromise difficult. In benefit eligibility cases, for example, the Government generally takes the position that the claimant either is entitled to the benefit or is not and will not consider splitting the benefit to settle.

15. The Pre-Argument Statement is a one-page document required by Sixth Circuit Rule 18(b) to be filed within 14 days after the filing of the notice of appeal. It contains the names and addresses of counsel, designation of the case-type, the nature of the decision below, the remedy obtained or denied below, the basis of appellate jurisdiction, the issues proposed for appeal, notification or related cases or cross-appeals, reference to any statutes or cases which the appellant thinks will be determinative of the appeal or the interpretation of which is central to the litigation, and other information necessary for a preliminary understanding of the case. 6th Cir. R. 18(b).

16. Sixth Circuit Rule 18(a) lists the documents which are required to be sent by the district court clerk with the notice of appeal. *See supra* note 8.

filed in the Sixth Circuit overall.[17]

For the cases that are selected for conferences, notices are sent two or three weeks in advance of the conference date to the lawyers who are indicated either on the pre-argument statement or on the Court of Appeals' docket sheet as lead counsel in the appeal. The notice sets a date and time when a conference will be held and explains its purposes. It directs the lawyers to review with their clients the advantages of settlement at this early stage of the appellate process and asks that they be prepared to make and accept proposals for settlement that would be consistent with their client's interests.

The Sixth Circuit program conducts most of the conferences by telephone. This procedure is far more economical for the parties than requiring them to travel to Cincinnati for personal conferences, and is more efficient than having the Conference Attorney travelling throughout the circuit. In terms of personal dynamics and settle-

17.

Comparison Of Court Filings With Conferenced Cases By Case Type

For the Period 7/1/83 -- 12/31/83

Case Type	Court Filings	Conferenced Cases	
		Settled	Settled and Unsettled
Bankruptcy	6.8%	11.6%	6.0%
Civil Rights	26.8%	29.0%	33.6%
Diversity	16.6%	27.5%	31.0%
Other Civil	47.3%	31.9%	28.7%
Original Proceedings	2.5%	—	.7%

The categories in the chart are taken from the Clerk's monthly statistical reports and are limited to the types of cases considered by the conference program.

The disparity between cases filed and settled for "diversity" and "other civil" cases may be explained in part by the fact that the Clerk's Office categorizes as "other civil" some cases which the conference program categorizes as "diversity."

There were a total of 691 "court filings", 69 "settled" cases, and 268 "settled and unsettled" cases in the sample period from which the percentages in the chart were drawn.

ment, there are advantages and disadvantages to the telephone conference that seem to balance out. Most importantly, and contrary to what might have been expected, the telephone conference works.[18]

Given its present resources and procedures, the program cannot schedule conferences in all of the new eligible appeals. Lawyers who think their case might benefit from a conference may call the Conference Attorney's Office to ensure that their case is scheduled. While this method of self-selection has not been emphasized in the past, it is being encouraged now[19] in an effort to concentrate the resources of the program more effectively on cases with procedural problems or higher potential for settlement.

IV. The Pre-Argument Conference

After reminding counsel that all discussions are confidential and off the record,[20] the Conference Attorney typically begins the conference by inquiring about any procedural problems that exist or may be anticipated by counsel. The kinds of problems raised most frequently include confusion about the court's deferred joint appendix procedure, problems obtaining transcripts, questions about documents or exhibits to be transmitted with the record, and briefing schedules in cross-appeals or cases involving multiple parties. Problems often can be resolved by agreement between the parties and questions can be answered by the Conference Attorney directly or by referral of the inquiring lawyer to appropriate court personnel. Sometimes the timeliness of the notice of appeal or other challenges to the court's jurisdiction are discussed, although jurisdictional problems usually cannot be resolved by the parties.[21] In cases where extraordinary briefing schedules are warranted, they are developed by agreement of the parties and instituted pursuant to Rule 18(b)(3).[22]

Following this discussion of procedural matters, the focus of the conference turns to the substance of the appeal and the possibilities, if any, of settlement. Counsel for appellant is asked to explain the primary issue or issues which the appellant intends to present to the Court of Appeals.[23] The purpose of these discussions is not to reach a conclusion on the merits, but merely to clarify the questions and weigh the possible outcomes. Reevaluation of the case for settlement at this time is particularly appropriate in light of the changed circumstances that exist on appeal. In many cases, the parties have not

18. Lawyers whose cases were settled after participation in a telephone conference were asked in a questionnaire to write in a number from 0% to 100% in response to the following question: "What do you think the chances are (approximate) that this case would have settled before oral argument if the Court had not become involved in settlement discussions?" The median response was 15%. Further, only 11% of the respondents in settled cases answered "yes" to the question: "Do you think settlement in this case would have been made easier by an in-person conference rather than a telephone conference?" Only 10% of the respondents in unsettled cases answered "yes" to the question: "Would the chances of settlement in this appeal have been improved by an in-person conference rather than a telephone conference?"

Short questionnaires are sent to all lawyers who participate in pre-argument conferences after the program's involvement with the case is concluded. The questionnaires are distributed by and returned to the Circuit Executive in order to preserve anonymity and encourage candid answers. Questions vary slightly depending on whether or not the case was settled. All of the questionnaire data presented in this article is taken from a six-month sample period of March through August, 1983. Sixty-seven questionnaires were sent in settled cases and 310 in unsettled cases during this period. The response rate was 78% for the settled cases and 66% in the unsettled cases. A few of the questions were changed during the sample period, so the total number of responses is not identical for all questions. While the actual number of responses would be larger today than during the sample period due to the increased volume of work, there are no indications that the percentages of individual responses reported here would be significantly different today. The questionnaires were designed to provide feedback from the bar. No claims regarding statistical significance are made.

19. Recently, the Clerk has begun sending notices to the parties along with the briefing schedules advising them that conferences are not held automatically in all cases and inviting them to request one if they think it could be helpful.

20. Judges who have been involved in conferences have agreed not to sit on panels that deal with the case. A proposed addition to Sixth Circuit Rule 18 that would formalize this practice provides:

> (3) A judge who participates in a pre-argument conference or becomes involved in settlement discussion pursuant to this Rule will not sit on a judicial panel that deals with that case; except that participation is a pre-argument conference shall not preclude a judge from participating in any en banc hearings and decisions of the Court.

Also, the Second Circuit discusses the need for confidentiality in pre-argument conferences in Lake Utopia Paper Ltd v. Connelly Containers, Inc., 608 F.2d 928 (2d Cir. 1979), where it found appellee's counsel's disclosure to the court of comments made by that court's Conference Attorney during a pre-argument conference to be a serious breach of confidentiality.

21. The court's Staff Attorney section routinely reviews cases for jurisdictional defects and initiates judicial consideration for dismissal under Sixth Circuit Rule 9.

22. *See supra* note 8. An amendment to the rule has been submitted to the court's rules committee that would provide: At the conclusion of the pre-argument conference, the circuit judge or conference attorney *may* enter a pre-argument conference order controlling the subsequent course of the proceedings. [Emphasis added]

23. Appellants are not bound by or limited to the issues listed in the pre-argument statement or discussed in the pre-argument conference unless the parties to the conference specifically agree to raise or exclude certain issues.

reevaluated their case by the time of the conference and, even more frequently, they have not discussed their reevaluated positions with each other.

Among the changes to consider are standards of review that, on appeal, may differ significantly from the standard applied in the lower court. For example, evaluations in the trial court regarding the relevancy of evidence, credibility of witnesses, and sufficiency of evidence presented give way, in the appellate court, to determinations regarding whether the trial court abused its discretion or committed clear error and whether there is any evidence in the record on which a jury could have based its decision. In fact, the parties to the appeal may actually be seeking judicial determination of a particular point that the appellate court will not have to reach to decide the case.

There also can be new financial and emotional considerations. Litigants on appeal often face significant costs for transcripts, briefs, and oral argument. A defendant may have to post a bond and pay up to 12% for post-judgment interest. One side can end up paying the other's costs, and in certain cases,[24] attorney's fees for the appeal. If the appellate court remands the case for a new trial, both sides face substantial additional expense in the trial court and more uncertainty. These considerations, coupled with the fact that the conflict as embodied in the litigation will continue for at least another year, can induce additional personal stress that should not be overlooked in assessing the parties' interests in settlement.

An assumption underlying the pre-argument conference procedure is that many litigants never discuss settlement because they believe that being the first to propose settlement demonstrates a lack of confidence in their case or a lack of sufficient will or resources to continue the litigation. Thus, it is feared that appearing to be willing to settle will enhance the other side's position and give some advantage. Also, many competent litigators lack confidence as negotiators[25] and will not press negotiations beyond opening remarks which often state either extreme or vague initial positions. Through the conference program, the court initiates the settlement discussions and presses the search for mutually agreeable terms.

24. For example, some civil rights and antitrust statutes authorize attorney's fees for prevailing plaintiffs and many commercial contracts provide for payment of fees to prevailing parties.

25. Chief Justice Warren Burger seemed to recognize this problem in his Annual Report on the State of the Judiciary, delivered at the midyear meeting of the American Bar Association in Chicago, Illinois (January 24, 1982) when he said: "Law schools have traditionally steeped the students in the adversary tradition rather than in the skills of resolving conflicts . . . . Only very few law schools have significant focus on arbitration. Even fewer law schools focus on training in the skills—the arts—of negotiation that can lead to settlements." Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982).

The pre-argument conference provides a non-adversarial forum in which any action that affects the parties' rights is performed voluntarily and presumably only when in their own best interest. Thus, in this forum counsel are urged to shift their goal from legal victory to discovery of a mutually agreeable solution. It is not always easy for the litigants to turn aside the competitive edge that is honed in the trial court and carried forward to oral argument. By shuttling proposals between the parties and discussing with each side their merits and supporting rationale, the Conference Attorney helps to direct the participants' energies toward the problems that must be overcome in order to settle the case. He encourages questions and neutral analyses rather than accusations and arguments. Interruption of the adversarial momentum sometimes enables bold and creative new solutions to the problems underlying the litigation.

V. Taking Advantage of the Opportunities

Generally, conferences seem to be most productive when counsel come prepared; that is, when they are familiar with the pertinent facts and law and know what their clients really want and need. It also helps for counsel to have considered the wants and needs of the other side. The parties are well advised to avoid coming with fixed "positions,"[26] but should have objective, articulable bases for making and responding to settlement proposals. More specifically, there are aspects or characteristics of the pre-argument conference that, if recognized and understood, provide opportunities which counsel can use to the advantage of his or her client. There are also ways these opportunities can be lost.

Perhaps the most important aspect of the pre-argument conference is that it is scheduled and conducted by full-time staff of the court, and offers a credible forum for litigants that is neutral and confidential. Thus, the conference is especially useful in cases where credibility or communication between the parties has been lacking. The Conference Attorney initiates and leads the discussions, asking

26. Roger Fisher and William Ury of the Harvard Negotiation Project, in their excellent book about negotiating, explain how positional bargaining produces unwise agreements, is inefficient and endangers ongoing relationships. They suggest focusing on interests rather than positions. R. Fisher & W. Ury, Getting to Yes (1981).

questions himself and inviting them from each side. If the record or district court opinion is in, he will usually have some idea of what happened in the court below. He tries to keep the lines of communication open and the negotiating process trustworthy. In some cases, the conference only confirms what the parties already know. In many other cases, however, lawyers gain a clearer understanding of the issues on appeal[27] and determine whether the case has any settlement potential.

Another aspect of the conference is the fresh, third party perspective it provides for the issues. This perspective is timely as the case moves to the appellate stage and is particularly useful where the parties have an honest and specific difference of opinion about the case. When differences occur, the Conference Attorney might offer his own view. His opinion has absolutely no effect on the disposition of the appeal by the court and carries no weight except for its neutrality and whatever merit the lawyers might see in it. Whether or not the Conference Attorney offers an opinion, he will encourage the parties to look at their case more critically and objectively.

Finally, as mediator, the Conference Attorney works to facilitate the lawyers' direct negotiations with each other. In this role, he encourages participants to formulate and extend reasonable proposals and counter-proposals and often shuttles these back and forth between the parties, discussing with each side the reasoning behind them and the merits of each. This kind of involvement is valuable in several circumstances. First, it helps get negotiations started by getting serious proposals—proposals with some supporting rationale—on the table. Next, this involvement keeps the negotiations moving by assuring that every offer gets a response. It helps to overcome avoidance of negotiation by a party who feels intimidated by a perceived imbalance in resources or negotiating skills. Finally, the mediator sometimes can nudge the parties through impasses and over those final gaps that often remain as the two sides move closer together in the negotiation process.

There are several ways that the opportunities described above can be and occasionally are lost; that is, lost in the sense that both sides want to settle but do not as a result of a misunderstanding or misuse of the conference procedure. Pressing extreme bargaining positions is one way of forgoing the opportunities of the settlement process; that is, maintaining positions not reasonably related to the

27. Forty-six percent of the respondents in unsettled cases answered "yes" to the question: "Was the conference procedure helpful in clarifying the issues?" See generally *supra* note 18 for a description of the questionnaires.

value of the case. Usually, such proposals are taken as a sign that the proponent does not want to settle. Whether viewed as a deliberate attempt to be aggravating or as implying that the side on whom the demand is made does not understand their case, extreme positions tend to harden attitudes and reduce possibilities for good faith negotiations. Even when the receiving side is not offended, it might assume that the offeror is not evaluating the case realistically and that settlement discussions probably are a waste of time. At a minimum, extreme opening positions provoke extreme responses which use up time and goodwill and diminish confidence in the process.

A second problem is bargaining too hard. A few lawyers seem to believe that a good settlement requires long and hard-fought (and for some, acrimonious) negotiations. Indeed, some lawyers insist that every offer they make is their "bottom line" and perceive every offer they receive as a challenge. Valuable opportunities can be missed by taking this approach. Agreements to move from previously fixed settlement positions occur fairly frequently during conferences. Perhaps this is because the parties can explore settlement possibilities through the Conference Attorney without putting their money on the table. Whatever the reason, it is important to remember that no one is bound by any offers or expressions of willingness to change their position unless an agreement is reached. When the parties leave the conference without a settlement, reconciled to the idea that one is not possible, whatever progress was made can be lost. It is difficult afterwards for the hard bargainers to reinitiate settlement discussions, or to try to come back to offers previously rejected, without feeling even more vulnerable than if they had allowed themselves to be moved by the momentum of the conference. Thus, whatever value there may be in hard, resistive bargaining can be lost if the resistance is carried beyond the conference.

A third situation arises when significant progress is made in a conference and one party suddenly stops short of settlement, apparently in the hope of negotiating a better bargain independently. This can result when one side is spurred by sudden progress to new and higher settlement expectations or when parties come into the conference already viewing it as one piece of an overall negotiating strategy. In the latter situation, the party might feign an expectation of reaching settlement at the conference to encourage the other side to move substantially from their prior position and then stop short of accepting a reasonable offer. This technique can fail for all of the reasons discussed above and also because only the most committed or desperate negotiators will continue to bargain when they suspect bad faith.

VI. Conclusion

The pre-argument conference adds a new dimension to practice in the Sixth Circuit. It offers assistance in simplifying and terminating appeals. The conferences are helpful in resolving procedural problems,[28] clarifying issues on appeal, and evaluating cases for settlement.[29] Most importantly, parties consider and explore settlements as an option with only minimal risk of loss of their bargaining position and no risk to their litigation position. The program has been well received by the bar[30] and has facilitated a substantial number[31] of settlements. As Sixth Circuit practitioners become more familiar with the program and its procedures, its usefulness to the court and the bar should increase.

28. Fifty-three percent of the respondents in unsettled cases answers "yes" to the question: "Was the conference procedure helpful in resolving any procedural problems?" See generally *supra* note 18 for a description of the questionnaires.

29. Forty-one percent of the respondents in unsettled cases answered "yes" to the question: "Was the conference procedure helpful in evaluating the appeal?"

30. The comments in the questionnaires are overwhelmingly positive, usually acknowledging the benefits described in this article. Less than 5% of the questionnaires contained comments that could be considered negative or critical although some offer suggestions for improvement. Approximately 3% of the respondents in settled and unsettled cases answered "yes" to the question: "Was there anything about the way the conference was conducted that was unfair or inappropriate?" Most of those commented either that the Conference Attorney "leaned" too hard on the appellant or that they feared their discussions might somehow be revealed to the court.

Less than 3% of the respondents in unsettled cases answered "yes" to the question: "Would the chances of settlement have been improved by anything else the Conference Attorney could have said or done?"

31. *See supra* notes 11 & 18.

THE RETROACTIVITY OF THE SIX-MONTH STATUTE OF LIMITATIONS IN SECTION 301 CASES

*Daniel G. Galant**

The Supreme Court in Del Costello v. Teamsters, *held that the statute of limitations for claims arising under section 301 is six months. The Sixth Circuit has issued inconsistent decisions on whether the Supreme Court's ruling is retroactive. Mr. Galant discusses the decisions by the Supreme Court and the Sixth Circuit and concludes that the Sixth Circuit should hold that the decision is retroactive.*

I. Introduction

Recently, both the United States Supreme Court and the Sixth Circuit Court of Appeals have held that the statute of limitations for labor law cases arising under section 301(a) of the Labor Management Relations Act of 1947 (LMRA)[1] is six months. In support of their decisions, both courts applied the limitations period found in section 10(b) of the National Labor Relations Act (NLRA).[2] In determining whether these rulings are retroactive, the Sixth Circuit has rendered apparently contradictory decisions. This article will discuss the retroactivity issue by examining its origins

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1. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1976), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

2. National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1976), provides in pertinent part: "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board. . . ."